circumstances, considered as a whole, to my mind constitute the offence of attempt at fraudulent evasion of export duty.

As to the gap which lies between the immigration check point and the customs check point, I should think that it is meant to facilitate those travellers in vehicles who in good faith change their mind about leaving the country after the immigration check point, or who have no proper travel documents and are ordered by the immigration officers not to leave the country. It is a notorious fact that vehicles get into the immigration point in lanes, and ordinarily it is not possible for a vehicle which has got into a lane to reverse because of vehicles at the rear. The gap is intended for such vehicles. It is not intended to provide an escape route for a prospective smuggler, who has a change of heart on finding that he cannot dodge the customs at the check point.

The very finding of the learned President that the respondent should have taken a further step i.e. dashing on without stopping at the customs check point shows that the prosecution's evidence as it stood falls within principle (a) in *Houghton's case* indicated above. If the further step had been accomplished, the question of attempt does not arise as the offence of fraudulent evasion would have been completed, whether or not the offender reaches the border, as in this event the respondent would have got over the customs without declaring the goods.

I would also like to touch on one point. Towards the end of the grounds of judgment the learned President considered the following evidence by the investigation officer when he questioned the respondent:

"Accused told me that he had left the tin in the car earlier and went on to work. In the evening he decided to go to Singapore in the car. Accused told me that after he had passed the immigration check point he remembered about the tin. He then decided to turn back."

The learned President remarked:

"How could this not have possibly happened. Is it totally improbable that that was the reason why the accused turned back. The fact that he failed to stop in the circumstances does not make his story absolutely convincing but then the accused is not required to assert anything beyond a reasonable doubt."

To this, I need only say that it is understandable if a person forgets small items of goods left in the car. But it is much too heavy a test on the credulity of an ordinary person that anyone could have forgotten 9.45 piculs of tin ore in a small car. Anyway, it was the court's finding that the respondent's story was not absolutely convincing. I fail to see then that it could still entertain reasonable doubt.

The grounds of judgment show that the trial court dealt with most of the evidence in isolation, and then equated such evidence with hypothetical questions based on situations which have little bearing on the evidence to be considered.

I hereby order that the acquittal be set aside and the case be tried before another President.

Acquittal set aside.

Solicitors: *R.K. Menon & Co.*

BANK BUMIPUTRA MALAYSIA BHD. v. YEOH HO HUAT

[O.C.J. (Ajaib Singh J.) April 28, 1977]
[Malacca — Civil Suit No. 122 of 1972]

Torts — Fraud — Deceit — Fraudulent valuation — Land valued at $64,768.20 sold for only $7,600 — Valuer had no honest belief in truth of false statements in his valuation report — Reliance on said valuation by plaintiffs/bankers in advancing loan — Duty of care owed to plaintiffs — Damages.

Valuer — Valuation — Fraudulent valuation — Valuer had no honest belief in truth of false statements in his valuation report — Reliance on said valuation by plaintiffs/bankers in advancing loan — Duty of care owed to plaintiffs — Damages.

The plaintiffs in this case were bankers having their registered office in Kuala Lumpur with a branch office in Malacca. The defendant was a licensed appraiser and valuer having his place of business in Malacca. In November 1967 one Ali applied for a loan which was to be secured by a charge on his land. A valuation report by a licensed valuer was to be submitted to the plaintiffs before the loan could be approved. The defendant valued the said land at $64,768.20 and the plaintiffs in reliance on the said valuation report approved the application of the said Ali for the loan. The land was charged to the plaintiffs to secure the payment of $20,000 plus interest. On Ali's default to pay the loan, the plaintiffs applied to the Collector of Land Revenue for an order for the said land to be sold under the provisions of the National Land Code. The sale was conducted twice but there were no bidders at these two sales at or above the reserve price of $7,600. The land was finally sold to one Baharuddin for $7,600.

The plaintiffs sued the defendant for damages allegedly caused by a fraudulent valuation by the defendant as a valuer in respect of the said land.

Held, allowing the plaintiffs' claim: (1) an action of deceit would lie at the instance of any person who had acted on the fraudulent report of a valuer;

(2) there was no contractual relationship between the plaintiffs and the defendant with regard to the valuation report yet it was abundantly clear from the evidence that the defendant was aware that his report was intended to be acted upon and he thereby owed a duty to any person who so acted upon the report;

(3) the defendant had no honest belief in the truth of the false statements in his valuation report. He had made the false statements knowingly and recklessly without caring whether they were true or false;

(4) the plaintiffs' reliance on the said report had resulted in their advancing the loan to one A and they thus suffered damage as the land was eventually sold for the true value of $7,600 as against the value put in the report at $64,768.20.

Cases referred to:-

(1) *Derry* v. *Peek* (1889) 14 App. Cas. 337.
(2) *Cann* v. *Willson* (1888) 39 Ch. D. 39.
(3) *Le Lievre* v. *Gould* [1893] 1 Q.B. 491.
(4) *Hedley Byrne & Co. Ltd.* v. *Heller & Partners Ltd.* [1964] A.C. 465.

CIVIL SUIT.

A.K. Bashir for the plaintiffs.

Ong Boo Kok for the defendant.

Cur. Adv. Vult.

Ajaib Singh J.: The plaintiffs in this case sued the defendant for damages allegedly caused by a fraudulent valuation by the defendant as a valuer in respect of three pieces of land held under E.M.R. Lot Nos. 23, 27 and 28 in Town Area XXXII containing a total area of 4 acres 3 roods 33 poles.

In their amended statement of claim the plaintiffs averred that they were bankers having their registered office in Kuala Lumpur with a branch office in Malacca and that the defendant was a licensed appraiser and valuer having his place of business in Malacca. In or about the month of November 1967 one Ali bin Hasim applied for a loan which was to be secured by a charge on the land concerned. A valuation report by a licensed valuer was to be submitted to the plaintiffs before the loan could be approved. It was alleged by the plaintiffs that at all material times the defendant knew that the valuation report which was required by the plaintiffs would be shown to them who as the defendant at all material times well knew were minded to accept the charge on the said lands but before doing so wished to have a sight of the valuation report. It was further averred that the defendant valued the lands and prepared a report in writing dated December 4, 1967 wherein he valued the said lands at $64,768.20 which was either false to his knowledge or was made without regard to whether it was true or false with the intention that it should be acted upon. The plaintiffs in reliance upon the said valuation report approved the application of Ali bin Hasim for the loan and the land was charged to the plaintiffs to secure the payment of $20,000 plus interest.

The plaintiffs further averred that Ali bin Hasim having failed to pay this sum duly demanded by them the plaintiffs applied to the Collector of Land Revenue for an order for the said land to be sold under the provisions of the National Land Code. This order was made by the Collector on October 26, 1961 wherein the reserve price was fixed at only $7,600. The sale was conducted twice the first on November 29, 1971 and the second on May 2, 1972 but there were no bidders at these two sales at or above the reserve price of $7,600. Thereafter pursuant to an order of the High Court dated July 14, 1972 the land was sold to one Baharuddin bin Mohd Yusop for $7,600.

It was alleged by the plaintiffs that in valuing the lands the defendant acted fraudulently and that he failed to exercise all due skill and care in valuing the said land particulars of which were set out in the statement of claim. The plaintiffs claimed that the said Ali bin Hasim owed them a sum of $31,724.15 as at April 25, 1973 inclusive of interest after deducting the sum of $7,600. They alleged that the value of the said lands as described in the valuation report of the defendant was not in the region of $64,768.20. The actual value was around $7,600 or less. The plaintiffs thereby claimed that they suffered loss and damages.

In his defence the defendant denied the various allegations made against him and he denied that he owed the plaintiffs the alleged or any due care. He further denied that in making the said valuation report he was negligent as alleged or at all and that if the report was false as alleged the defendant denied that it was made fraudulently. The defendant further denied that the value of the land was in the region of $7,600 or less.

The plaintiffs' manager said in his evidence that Ali bin Hasim called upon him with one Choo Cheng Weng to secure a loan of $30,000 from the bank and he asked for a valuation report from a proper valuer on the three titles which were brought to him as security. Subsequently a valuation report was produced. This report was prepared by the defendant who valued the three lots at $64,768.20. After studying the report the plaintiffs' manager recommended a sum of $25,000 for approval by his head office which he based roughly at about 30% of the valuation report. The loan was eventually granted at a reduced figure of $20,000 at 9.6% interest per annum with monthly rests and the land was charged to the bank. The manager said that he acted on the valuation report when making his recommendation. The balance still unpaid by the borrower and now outstanding was $16,682.90. He said that if the valuation had been around $5,000 the bank would have given only $2,000 as a loan. The valuation report had stated that there was adequate access both by road and river to the lands which he took to mean the normal case of a road leading to the land but as the land in question was surrounded by a river he meant a bridge and a road. He said if there was no road access the bank might or might not have given any loan. If there was no access to the land and the valuation was $64,000 the amount recommended would be lower at about $10,000 or $15,000.

The borrower failed to pay the outstanding debt and the plaintiffs got an order for the sale of the land for which the reserve price was fixed at $7,600. The sale was conducted twice but there were no bidders. Subsequently the land was sold for $7,600 and as a result the plaintiffs suffered a loss.

In cross-examination the manager said that Ali bin Hasim and Choo Cheng Weng came to enquire about the possibility of obtaining a loan and he advised them to bring security as well as a valuation report of the property. He said that after receiving the valuation report he recommended to his head office for the loan to be granted to the applicant. The head office he said need not accept his recommendation. His power was only to recommend and not to make a decision. It was on his recommendation and on the valuation report that the head office approved the loan. A copy of the valuation report was also sent to the head office. The loan was approved by the head office on February 6, 1968 and he said Mr. Choo Cheng Weng stood as guarantor. He said that he would not have recommended the loan on Choo Cheng Weng's guarantee alone. He said that he made the recommendation first on the basis of the titles and the valuation report and in addition the guarantee by Choo Cheng Weng. He said that he put the valuation report over the guarantee. He said that the plaintiffs would either value the property produced as security themselves or they would ask for a valuation report by a licensed valuer. In this particular case he based the recommendation on the valuation report. The land concerned was within the town area. He said that the valuation was brought for the purpose of the loan and the valuation was for that purpose. He did not verify the valuation report because he was satisfied with it. He disagreed that the plaintiffs decided to recommend the loan even without a valuation. Further he stated that upon reading the valuation report he was aware that the land was surrounded by a river. The road mentioned

in the report having access to the land would reach one bank of the river and there was no mention of a bridge in the report.

The next witness for the plaintiffs was Koh Kin Aun, Assistant District Officer and Collector of Land Revenue, Melaka Tengah. He said that Lots 79 and 80 referred to in the valuation report were not in Town Area XXXII as stated under the heading "Land Values" but were in the Town Area XXXI. Lot 79 had now been sub-divided and was known as Lot 115 and Lot 117. They were E.M.R. land. Lot 80 was a freehold land and as such it was not in his register. There had been no transfer in respect of Lot 115. There were two transfers in 1959 and 1960 in respect of Lot 117 and there was no further transfer after that date. Lots 23, 27 and 28 the lands in question which were given as security for the loan were surrounded by a river and consisted of an island in the river. He produced a map showing this island. He said that there was no road access and the lands were covered with thick under-growth. During high tide the areas near the river bank would be under water. There were no other lands on the island. These three lots formed the island and there were no contiguous lots.

The Assistant District Officer further said that the first reserve price for the sale of the lands was $7,600 but there was no bidder. There were two auctions but there were no bidders. Subsequently the three lots were sold at $7,600. This value of $7,600 was based on the valuation report Exhibit P5 made by the Settlement Officer.

In cross-examination the Assistant District Officer said that the three lots 23, 27 and 28 were in the Town Area XXXII. There was nothing in his record to indicate the use of the land. According to the map there was no access road to the land and there was nothing to show in the map any proposed roads. The Municipality maps might show road reserves. He said that the three lots were sold together to one Baharuddin bin Mohd Yusof. When asked if the lands could not have fetched a better price if sold lot by lot he replied that he did not think so judging from the two futile earlier auctions.

The first witness the manager of plaintiffs bank was recalled for further cross-examination in respect of various sums of money paid in and taken out by the borrower on his loan. In re-examination he said that the lands were sold together to Baharuddin bin Mohd Yusof of the plaintiffs bank. The land was sold with the permission of the court. This member of the bank's staff was now holding the property in trust for the bank as the bank could not hold property in its name.

The third witness for the plaintiffs was Lee Teng King, Engineering Assistant of the Malacca Municipality. He produced a map (Exhibit P4) of lots 23, 27 and 28 to show an island completely surrounded by river. The whole land was a swampy area without any vegetation. In 1967 there was no proposed road to the north of the three lots but there was a proposal for a road to the south of the lands which was eventually abandoned. There was a gazette notification to that effect. He said that lots 79 and 80 were in the Town Area XXXI and it would not be correct to say that they were in Town Area XXXII as stated in the valuation report. In 1967 there were plans to turn lots 79 and 80 in Town Area XXXI into an industrial area. The plan was not gazetted. It was only drafted as a lay-out plan but was not approved as an industrial area. Notifications in the gazette were only draft lay-outs of the area and they were not specified as industrial area.

The fourth witness for the plaintiffs was M. K. Thomas, Technical Assistant, Survey Department, Malacca. He produced an authoritative plan (Exhibit P9) showing lots 23, 27 and 28. They were certified plans. There was no access road to these lands and as far as his department was concerned there was no proposed road to the lands. He said these lots were mainly swampy land without any vegetation and the whole area was surrounded by river. There was no vegetation in the adjoining lots as well and they were also shown as swampy on the edge that is on the river side. He produced another map (Exhibit P10) which he described as the vegetation map wherein lots 23, 27 and 28 were stated as either agriculture, padi or swampy.

The fifth witness for the plaintiffs was Idris bin Mohd the Sidang Pengkalan Rema Pantai. He said he had been the Sidang there since 1965 and he knew lots 23, 27 and 28 which were beside the Malacca river. The land had only attap trees and during high tide the whole land would be under water. If it was high tide the water would be waist high and if not very high the water would be ankle deep. There would be no water at higher ground. The soil at high ground was soft black earth. One's feet would sink if one walked over the land. To go to the land one must take a sampan. There was no road leading to the land. The river there was deep over a man's head even at low tide. He said that the position of the land was the same today. There was no track leading to the land. The surrounding lots were also swampy with attap trees. Lots 23, 27 and 28 were in fact an island in the river. Taking the island as a centre the area was swampy around it for about 4 chains — swampy with attap trees. Beyond that was padi land.

The next witness for the plaintiffs was Abu Bakar bin Haji Ali, Settlement Officer, District Office, Central Malacca. He produced a valuation report (Exhibit P5) dated September 14, 1971 which he had prepared. He said E.M.R. means Extract from Mukim Register and reserved for Malays only. He was a Government valuer and had been doing land valuation work for the last 25 years — 7 years at Jasin and the rest in Malacca at Central District. He said that the three pieces of land mentioned in his report were only for cultivation even till today. The three lots in question were in the town area but they did not fall under the industrial area. The three lands were surrounded by the Malacca river in other words the three pieces of land formed an island. There were adjoining lots immediately after the river, along the river bank. To the north the land was nipah palm land, on the east the land was plain with two or three squatter type houses. On the south also flat land with Malay houses and coconut trees. On the west

it was swampy land. The lands which he had described were E.M.R. lands and some Statutory Grant lands. Referring to the valuation report which states under "Description" — "The adjoining lots are all industrial lots and a sawmill is built directly south of the lots" the witness said that the adjoining lots were as he had described to the north, south, east and west and there was no sawmill on the adjoining lots but there was one far away and one had to pass through another piece of land to reach it. The sawmill was about 10-15 chains away from the river bank to the east. From the river bank to the sawmill there were bushes and some coconut trees and it was not a developed area. There were only 5 or 6 plank houses. There was a small path leading up to the river bank and there was no path or road leading up to the 3 lots. Referring to paragraph under heading "Land Values" he said there were no such lots Nos. 79 and 80 in the Town Area register as stated in the report. He said that he valued the land at $1,600 per acre. He based his valuation first on the type of title — the three lots were E.M.R. lands, secondly the three lots were only meant for cultivation and thirdly the lands in the three lots consisted of bushes only with no trees or plantation which could produce an income. The three lots were always affected by floods. There was no bridge and one wanting to go to the three lots must go by boat and because of all these factors he was of the opinion that no one would like to buy that type of land and having regard to all these he had valued the lands at $1,600 per acre.

In cross-examination the witness said that his basis for valuing the land at $1,600 per acre was that the land was not developed, there was no road access and it was swampy and was not near any road. He valued the land at 3½ cents per square foot. In contrast he referred to some land at Machang which was acquired by the Government at 20 cents per square foot. This land was developed land along the main trunk road and consisted of Statutory Grants and E.M.R. This land was about 8 chains from the three lots in question. He disagreed that he had fixed the 3½ cents per square foot arbitrarily. He had based his calculations on relevant considerations. He had based his valuation on actual value as cultivation land and the actual value of the land including possible use of the land — present and future. He said in his view the condition of the land as well as the type of grant for the three lots was not suitable for industrial use. He had valued the land at 3½ cents per square foot in September 1971 and he said that as the land was not developed after 1967 the value in 1967 would be the same as in 1971. He disagreed with a suggestion by counsel for the defendant that there was a speculation element in 1967 that the land concerned and surrounding land would be converted for industrial purposes. He was not aware that the land was gazetted in 1968 three times for purposes of industrialisation.

The last witness for the plaintiffs was Othman bin Hasim also known as Ali bin Hasim. He said that he was the owner of the three pieces of land in December 1967. He had purchased the land from one Abdul Ghani bin Yaacob for $5,000 the previous year. He said that he did not at any time send the title deeds of the land to the defendant for valuation either directly or through any agent nor had he given any instructions to do so through any agent. In fact he had not seen the defendant before. He was only seeing him for the first time in court. He knew nothing about the valuation report prepared by the defendant on his land and he did not know who paid for the valuation fees. He said that the land was actually purchased by one Mr. Chong who registered the land in the name of the witness. The $5,000 was paid to him by Mr. Chong and he paid the money to the vendor. Subsequently he went along with Mr. Chong to see the manager of the plaintiffs bank for the purpose of getting a loan. Mr. Chong had the documents with him and although he was present during the discussion he could not understand what Mr. Chong spoke to the manager in English. He said that he was employed by Mr. Chong as a driver at a salary of $150 per month and he had been approached by Mr. Chong to obtain a loan of $20,000 from the bank to start a business. He said that Mr. Chong wanted to start a housing project. He said he had no intention to start an industrial business and that he had not seen the land in question at all.

In cross-examination he agreed that he was only a front man for Mr. Chong's business ventures and he would abide by any decision made by Mr. Chong.

The defence called two witnesses. The first was the defendant himself. He said that he was in the Government Survey Department for 20 years and in private practice as a land and engineering surveyor for 16½ years. He said that he had prepared the valuation report on the instructions of Mr. Chong Cheng Weng who had asked him to prepare a valuation of the land for industrial use. The land belonged to Encik Ali bin Hasim. Mr. Chong told him that he had an interest in the land and was acting on behalf of Ali. Referring to the report under paragraph "Description" he said that there was a proposal for an extension of the industrial area and all these lots were inside the proposed extension. He said that Mr. Chong being a Municipal councillor had got that information. He had gone to the Municipality to check on this information but as the proposal was confidential he could not buy a copy of the proposed extension.

The defendant further said in his evidence that he himself was a Municipal councillor from 1959 to 1962 and he was aware of the steps to be taken when a piece of land was to be converted into industrial land. Under "Land values" the defendant said that the search was made by his assistant one Lee Chee Keong regarding the two lots mentioned therein namely lots Nos. 79 and 80. His assistant left him in 1968 but he could trace him if given time as he was still living in Malacca. Under "Opinion of value" he said he had arrived at 30 cents per square foot limited for industrial use. There was nipah and mangrove swamp and to make the land usable it was necessary to reclaim the soil. He produced some calculations (Exhibit D12) in support of his valuation of the land as developed land. He said there were many types of valuation and he himself was specialised in land survey, land titles survey and sub-divisions as

well as engineering and road works survey. He said that he very seldom did valuation of land for the purposes of a bank loan.

In cross-examination the defendant said that "Actual value" meant the value of the land between a willing purchaser and willing vendor in the open market as one could find for the land. He said that if one spent $88,000 as he had made his calculations one would get the value of the land at 34 cents per square foot and without spending any money on it the land might be worth about 10 cents per square foot if anybody wanted to buy it. Referring to the first paragraph of his valuation wherein he had been asked to ascertain the actual value he said that Mr. Chong in fact gave him verbal instructions to value the land for industrial use because Mr. Chong said he wanted to develop the land. He agreed however that the verbal instructions were not stated in his valuation report but he did not agree that he had given a report without caring whether it was true or false. He agreed that there was a difference between actual value of land and value after development. When it was put to him that the statement in the report that the adjoining lots were all industrial lots was not true the defendant replied that these had not been gazetted yet but when pressed for an answer that the statement was not true at that time he agreed that on December 4, 1976 the lots were not industrial lots. But in his own mind he thought that the area could be used for industrial purpose. He said that he never thought that the statement was false as it came to his mind that the lots could be used for industrial purposes.

When referred to his statement in the valuation report that there was adequate road access to the land when in fact there was no adequate access by road to that land the defendant's reply was that there was a road access up to the bank of the river. He denied making a false statement. He said that after putting in capital and after constructing a metal road it would be an adequate access by road. He said he had gone up to the edge of the river to see the land which had nipah and mangrove and was water-logged. He said that he did not mention these things in his report because it was for industrial use. He agreed that the proposed road up to the river bank was not gazetted but it was approved in principle

Under the heading "Land Values" he agreed that there were no such lots as lots Nos. 79 and 80 in Town Area XXXII. He said that his assistant might have made a mistake when he went to make a search at the Land Registry.

He agreed that the land in question would need filling up to 3 feet and he arrived at the figure of 34 cents per square foot as the value of the land after an expenditure of about $88,000 on the land. Questioned as to why he had not said so in his report he said that he had not mentioned this in the report but had explained it to Mr. Chong who had told him that the land was for industrial use.

The defendant agreed that he knew that his report was going to be acted upon but he did not know that it was for the purpose of a loan. He said that he had nothing to do with Bank Bumiputra. He had valued lands between 1966 and 1967 but he did not know whether such valuations had been accepted by Bank Bumiputra. He said that it was his expert valuation and provided the person acting on it knew how to develop the land he might get a profit. Questioned as to how a layman would know about it as he had not stated that in his report he replied that he never thought about it. He said that if a man was willing he could act on it and a bank might send another valuer to check on his report. Normally if the loan was for a big sum the bank would get another valuation.

The next witness was Mr. Yap Thean Ee, a chartered surveyor. He said he was qualified in 1958 and worked in the Treasury as a Valuation Officer from 1959 to the middle of 1963. He then joined the Malaya Borneo Building Society as a Staff Surveyor and eventually as Senior Staff Surveyor. For the last two years he had been in private practice. He was also a Member of the Board of Surveyors and he was licensed to practise as a building and valuation surveyor. He had given evidence in court before as a valuation officer.

This witness produced a report dated July 26, 1975 (Exhibit D13) on the three pieces of land which he had prepared on the instructions of the defendant. His instructions were whether the defendant's valuation made on December 4, 1967 on the land in question was fair and reasonable. He said that he made a study of the land concerned and he had been to see the land himself. The land was in a coastal swamp by the river side. He said he did not do a valuation in 1967 so all he could do now was to establish that the value of 30 cents per square foot was a reasonable price. To do this he had made a search in the Land Office and found that transfers recorded were quite near to what the defendant had expressed. In land valuation he said that the purpose of valuation was very important. He did a direct comparison of the sales. There were other methods too — one was developer's method which was to estimate what the land was worth if a developer wished to buy the land for the purpose of development. Basically the value was found when it was completed, then after deducting the costs of work required plus an element of profit the difference obtained would be the value of the land. He said he had used the direct comparison method in preparing his report. On methods adopted it depended on the surveyor but if the indication showed that the land was industrial land then the developer's method was the appropriate one.

Referring to the calculations prepared by the defendant in Exhibit D12 the witness said that it was a very simplified form of the developer's method. Assuming it to be industrial land item 3 was on the low side. He would put it at $50,000 but he was of the view that the other figures were reasonable. At the present date he would put the value of the land at $2.50 per square foot on the same assumption as industrial land. He said that the final figure of 30 cents per square foot in Exhibit D12 was very reasonable. The additional cost of the bridge would not affect the final figure. The value of 30 cents per square foot was slightly on the speculative side but

he would say that it was reasonable and not high. When told that the lands in question were sold at an auction for $7,600 the witness said that it was a very imperfect method of selling by auction. First it was difficult to inform the likely purchasers and secondly there would be a close market at auction sales. If it was a freely negotiated sale between a willing vendor and a willing purchaser it would fetch a higher price.

In cross-examination he said that he had not seen the actual agents. He said E.M.R. meant extract from mukim register and they were really agricultural lands. Exhibit P2A — C — they were agricultural lands but he had not checked the transfer values of these lands. Referring to the lands mentioned in his report (Exhibit D13) he said that those lands were all in Town Area XXXI but the three pieces of land concerned were in Town Area XXXII. He said his report was based on lands in Town Area XXXI. When he was referred to page 29 of Exhibit P1 where the three pieces of land were transferred on December 1, 1967 for $5,000 he said that this value did not necessarily form the actual and realistic value of the three pieces of land because it was known from experience that land for registration was under-quoted. He agreed however that the figures were subject to valuation for stamp duty purposes and that the lands were valued by a Government valuer but sometimes they were not valued by a Government valuer. If there was no doubt the value of the Settlement Officer was accepted. He said he did not make a search of transfers in Area XXXII although the land concerned was in that area. When he was referred to Exhibit P5 wherein the Settlement Officer had valued the 3 pieces of land at $1,600 per acre and to Exhibit P1 at page 29 where the value of all the 3 pieces in the transfer form is stated as $5,000 he agreed that these values could well be realistic. He agreed that the 3 lots were not in the Malacca Municipal Industrial Area.

The witness further said that there was a road access — a dirt track described in his report leading up to the river. He said his clerk made a search of Town Area XXXII and he agreed that there were no such lots as lot Nos. 79 and 80 in that area and therefore the defendant's report saying that these two lots were in Town Area XXXII was not a true statement. He said he had studied the defendant's valuation report and he had come to the conclusion that the value of 30 cents per square foot was reasonable. Asked again whether the prices mentioned in Exhibit P5 and page 29 of Exhibit P1 were more realistic he said that he could not agree because he did not know the basis of the valuation therein. However he agreed that the price of $7,600 for the land was very legitimate if it was based on small grant utilisation namely cultivation that is to say land covered with bushes, subject to floods and with no adequate access. In these circumstances the value of $7,600 he said would be a reasonable one.

In re-examination the witness said that it was not against survey principles to take into account transfer of lands in different town sections which were equivalent to the Malacca Town Areas. When asked to reconcile his statement that the price of $7,600 for the land was reasonable and that the valuation of 30 cents per square foot was also reasonable the witness said that the basis of valuation was different. In the first case the Settlement Officer took the five matters into account. The defendant's valuation considered the development potential. He said that the method of valuation and purpose of valuation were to be considered. For development purposes a swampy land might be better to some extent. It was more of a civil engineering problem. He agreed that the problem here would be finance. He said that it was possible to fill up the lands. The Settlement Officer's valuation was not made on this basis.

To further questioning by counsel for the plaintiffs the witness said that the lands he took for comparison were all from the western side of Malacca and all the industrial lots were also on the western side. He had not taken any lots from the eastern side and he agreed that there was a big difference in the quality of lands in east and west. To a further question by counsel for defendant he said he had taken allowance of the fact that the lots were on different sides and he said that if the lots were on the same side that is western side his valuation would have been very much higher. He also said that part of lot 85 mentioned in the Schedule in his report (Exhibit D12) was marshy land.

In answer to the court this witness said that the defendant's figure regarding acreage was as in Exhibit P2A-C. His own figure was taken from the Revision Survey Sheet. Hence the slight difference in the acreage stated in the two reports. In the schedule to his valuation report he said that lot 85 was not surrounded by water like the three lots in question. It was less swampy and marshy. It had a few fruit and coconut trees and there was a road reserve. The next lot 88 in the schedule was very much further and he agreed that this was no comparison as it was a very small lot. Lot 109 had a road frontage. It had coconut and fruit trees and was not marshy and flood prone like the 3 lots. Lot 124 was further away and was not shown in his plan attached to his report but the schedule described it as vacant land lying west of Bachang Road. It had a road frontage along Bachang Road and it was padi land. The last lot 129 was in Malacca Municipal Industrial Area.

After giving due consideration to the evidence in this case and the submissions advanced on behalf of the parties I decided in favour of the plaintiffs. An action of deceit will lie at the instance of any person who has acted on the fraudulent report of a valuer. See *Halsbury's* Laws of England, Third Edition, Volume 39 page 13 —

"Fraudulent valuation. A valuer who makes a valuation which is fraudulent, namely, one which is either false to his knowledge, or is made without regard to his knowledge of whether it is true or false, with the intention that it should be acted upon, is liable to an action of deceit by any person who was intended to act upon such valuation, and who acts upon it to his detriment. Liability arises in such a case regardless of the capacity in which the valuer may be acting."

In the oft-quoted case of *Derry* v. *Peek*[1] the head-note reads as follows: —

"In an action of deceit the plaintiff must prove actual fraud. Fraud is proved when it is shewn that a false representation has been made knowingly, or without belief in its truth, or recklessly, without caring whether it be true or false.

A false statement, made through carelessness and without reasonable ground for believing it to be true, may be evidence of fraud but does not necessarily amount to fraud. Such a statement, if made in the honest belief that it is true, is not fraudulent and does not render the person making it liable to an action of deceit.

A special Act incorporating a tramway company provided that the carriages might be moved by animal power, and, with the consent of the Board of Trade, by steam power. The directors issued a prospectus containing a statement that by their special Act the company had the right to use steam power instead of horses. The plaintiff took shares on the faith of this statement. The Board of Trade afterwards refused their consent to the use of steam power and the company was wound up. The plaintiff having brought an action of deceit against the directors founded upon the false statement:—

Held, reversing the decision of the Court of Appeal and restoring the decision of Stirling J. (37 Ch. D. 541), that the defendants were not liable, the statement as to steam power having been made by them in the honest belief that it was true."

Derry v. *Peek* appears to have been decided upon the narrow ground that there was insufficient relationship between the makers of the statement and the person who had acted upon it and hence that no duty of care lay upon the former to the latter. Also that an honest belief in the truth of a statement is not fraudulent. Subsequent cases however have shown a different trend. In the case of *Cann* v. *Willson*[2] Chitty J. held that a firm of valuers who had prepared a valuation of property which was mortgaged were liable to the mortgagee on two grounds namely that the defendants independently of contract owed a duty to the mortgagee which they had failed to discharge and secondly that the defendants had made reckless statements on which the plaintiffs had acted. This case was overruled by the Court of Appeal in the case of *Le Lievre* v. *Gould*[3] but it appears to have been re-instated in the House of Lords case of *Hedley Byrne & Co. Ltd.* v. *Heller & Partners Ltd.*[4] where Lord Morris of Borth-y-Gest said at page 502 — "... Independently of contract, there may be circumstances where information is given or where advice is given which establishes a relationship which creates a duty not only to be honest but also to be careful." It was held in this case "that a negligent, though honest, misrepresentation, spoken or written, may give rise to an action for damages for financial loss caused thereby, apart from any contract or fiduciary relationship, since the law will imply a duty of care when a party seeking information from a party possessed of a special skill trusts him to exercise due care, and that party knew or ought to have known that reliance was being placed on his skill and judgment (post, pp. 486, 502, 514)."

At the same page 502 of this case Lord Morris of Borth-y-Gest states further —

"My Lords, I consider that it follows and that it should now be regarded as settled that if someone possessed of a special skill undertakes, quite irrespective of contract, to apply that skill for the assistance of another person who relies upon such skill, a duty of care will arise. The fact that the service is to be given by means of or by the instrumentality of words can make no difference. Furthermore, if in a sphere in which a person is so placed that others could reasonably rely upon his judgment or his skill or upon his ability to make careful inquiry, a person takes it upon himself to give information or advice to, or allows his information or advice to be passed on to, another person who, as he knows or should know, will place reliance upon it, then a duty of care will arise."

In the present case the valuation report prepared by the defendant was clearly intended to be acted upon and the defendant therefore owed a duty of care to the plaintiffs who so acted upon the valuation report. The report contains false and misleading statements made recklessly without caring whether those statements were true or false. On the evidence before me I held that the plaintiffs had proved actual fraud on the part of the defendant in preparing the report. He had knowingly made false statements that the three lots fell within the Malacca Municipal Industrial Area and that the adjoining lots were all industrial lots. Under the heading "Access" it was stated that adequate access both by roads and river was available. Here too the statement was false for there was no road access to the land. The evidence in this case was that there was only a dirt track leading up to the river. The defendant's explanation here was that after putting in capital and after constructing a metal road there would be adequate access. This statement that there was access to the land by road was therefore false to the knowledge of the defendant. Under the title "Land Values" the statement that two pieces of land known as lot Nos. 79 and 80 in Town Area XXXII held under indefeasible titles situated directly west of the three lots were transferred to the present owners five years ago in 1962 for a consideration of 70 cents per square foot was false. The evidence clearly showed that these lots were not in Town Area XXXII (in which area the three lots in question were situated) but were in Town Area XXXI which is on the side where industrial lots are to be found. Also there had been no transaction from the year 1960 in respect of lots Nos. 79 and 80. To this the defendant agreed but said that his assistant might have made a mistake. This appears to be inexcusable for it was the defendant's duty to make careful inquiry before making out his report. This assistant was not called to give evidence although he was available and I was not prepared therefore to accept the bare word of the defendant that there had been a mistake. The valuation report ends with the "Opinion of Value" that the value of the lots limited for industrial use was at 30 cents per square foot. No basis for arriving at this valuation was stated in the report although in his evidence the defendant tried to justify his conclusion by putting up some figures which indicated that a large sum of money had first to be put in before the value of the land could be reached at 30 cents per square foot.

The defendant's valuer Yap Thean Ee put in his report of this land and he said he had valued the land by a comparison of sales which he put in as a schedule to his report. However in his evidence he appears to agree that in almost all these sales which he had listed in the schedule there was little or no comparison to the three lots in question. The first lot No. 85 sold on February 28, 1968 at 28 cents per square foot lying about 10 chains south of the property in question was less swampy and marshy and it was not surrounded by water. It had a few fruit and coconut trees and there was also a road reserve. The second lot No. 88 which is shown in the schedule was very much further and it had no comparison with the three lots in question and it was a very small lot of 3,000 sq. ft. On June 25, 1968 it was sold at $1.50

per square foot by an order of court. The third lot No. 109 had a road frontage with coconut and fruit trees and it was not marshy and flood prone like the three lots in question. The next lot No. 124 was further away and was not in this plan and the last lot in schedule lot No. 129 was in the Malacca Municipal Industrial Area unlike the three lots.

Also in his evidence Yap Thean Ee agreed in cross-examination that the price of $7,600 for the three lots of land as valued by the Settlement Officer was legitimate if it was based on small grant utilisation namely cultivation and land covered with bushes subject to floods and no adequate access. He had taken the comparative sales from a different section of the town and said that this was not against survey principles. He said that the land valued at 30 cents per square foot by defendant was also reasonable because the basis of valuation used by the defendant was different from the basis of valuation by the Settlement Officer. He agreed that the lots he took for comparison were all from the western side of Malacca where all the industrial lots were located whereas the lots in question were on eastern side. He agreed that there was a big difference in the quality of lands on the west and east side of Malacca but said that he had taken this into account in arriving at his valuation.

The evidence of Yap Thean Ee was far from satisfactory. His comparison of sales method proved to be of no use. And he would have the court accept the proposition that the value of the land at 30 cents per square foot could be reached if a large sum of money was first expended. I was not prepared to accept his evidence. From the evidence adduced in this case no reasonable businessman would ever venture to pay 30 cents per square foot for the three lots bearing in mind the nature of the land and its surroundings. On the other hand I accepted the evidence of the plaintiffs' witness the Settlement Officer who valued the land at $7,600. He based his valuation on the following factors namely that the land was E.M.R. land which he said would fetch a lesser price than lands on Statutory Grants. The three pieces of land in question were only meant for cultivation, the lands consisted of bushes with no trees or plantation which could produce an income and though they were in the town they did not come under the industrial area of Malacca. The three lots were surrounded by Malacca river and formed an island. The adjoining lots along the river bank to the north was nipah palm land, on the east the land was plain with two or three squatter type of houses. On the south also a flat land with Malay houses and coconut trees. On the west was swampy land. Some were E.M.R. lands and some Statutory Grant lands. There was no sawmill on the adjoining lots but there was one far away and one had to pass through another piece of land to reach the sawmill which was about 10-15 chains away from the river bank to the east. From the river bank to the sawmill there were bushes and some coconut trees and it was not a developed area. There were only 5 or 6 plank houses and there was a small path leading up to the river bank and there was no path or road leeding up to the 3 lots in question. He said he valued the land at $1,600 per acre and he based his valuation first on the type of title — the three lots were E.M.R. lands, secondly the three lots were only meant for cultivation and thirdly the lands in question consisted of bushes only with no trees or plantation which could produce an income. The land was always affected by floods. There was also no bridge and one wanting to go to the three lots must go by boat and taking all these factors into consideration no one would like to buy that type of land and having regard to all these he had valued the lands at $1,600 per acre. The land was not developed, there was no road access, it was swampy and it was not near any road and he valued the land at 3½ cents per square foot.

By way of contrast he referred to some land at Machang which was acquired by government at 20 cents per square foot, which was developed land along the main trunk road and consisted of Statutory Grants and E.M.R. This land was about 8 chains from the lands in question. He said he had based his valuation on actual value as cultivation land including possible use of the land — present and future.

In the instant case although there was no contractual relationship between the plaintiffs and the defendant with regard to the valuation report yet it was abundantly clear from the evidence that the defendant was aware that his report was intended to be acted upon and he thereby owed a duty to any person who so acted upon the report. In cross-examination the defendant said that he knew that the report was going to be acted upon but he did not know that it was for the purpose of a loan. He had previously valued lands but he did not know that his valuation had been accepted by Bank Bumiputra. He said that he just valued the lands. In the event I held that the plaintiffs had proved their case against the defendant. On the evidence before me I held that the defendant had no honest belief in the truth of the false statements in his valuation report but on the contrary he had made the false statements knowingly and recklessly without caring whether they were true or false. I also held that the plaintiffs' reliance on this report had resulted in their advancing the loan to Ali bin Hasim but they thus suffered damage as the land was eventually sold for the true value of $7,600 as against the value put in the report at $64,768.20. I therefore ordered that judgment be entered against the defendant for the outstanding debt due less $7,600. Costs were ordered to be paid by the defendant to the plaintiffs.

Order accordingly.

Solicitors: *Bashir & Co.; Mah-Kok & Din.*